United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1811

To be argued by
HOWARD WILSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1811

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT DONOVAN and DENNIS D'AMATO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

HOWARD WILSON,
JOHN D. GORDAN III,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Robert Donovan and Dennis D'Amato appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on May 28, 1974, after a two day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 73 Cr. 1093,* filed December 4, 1973, charged Donovan and D'Amato together in two counts with mail fraud (Title 18, United States Code, Section 1341) and charged D'Amato alone in one count with having made false statements in an affidavit filed in the United States District Court for the Eastern District of New York, in violation of Title 18, United States Code, Section, 1001.

* This indictment superseded Indictment 73 Cr. 577, filed on June 13, 1973, which had charged both defendants in two counts with mail fraud.

Trial commenced on December 18, 1973 and, on December 19, 1973, the jury convicted Donovan on the two mail fraud counts and D'Amato on the false statements count. On May 28, 1974, Judge Gagliardi sentenced Donovan to a four month term of imprisonment and imposed an 18 month term of probation on D'Amato.

Donovan has been released on his own recognizance pending appeal and D'Amato's sentence has been stayed.

Statement of Facts

The Government's Case

The Government proved at trial that Robert Donovan, a salesman in the chemistry industry, was a principal actor in a scheme to manufacture and sell a counterfeit version of a cosmetic hair preparation called Ultra Sheen and that Dennis D'Amato, who sold the finished counterfeit product to various legitimate distributors of cosmetic products, lied about the manner in which he had obtained the product in an affidavit filed in the United States District Court in Brooklyn, where he had been sued by the manufacturer of the genuine Ultra Sheen.

In September, 1971, Robert Donovan, posing as "George Zimmer", opened a telephone answering and mail receiving service under the name Zimmer & Associates with the Port Jefferson Telephone Answering Service at 1500 Main Street in Port Jefferson, New York (Tr. 2-10, 15-21; GX 1, 2).* The account was paid in either cash or money orders each month at the offices of the answering service, and the only address and telephone number provided by Donovan was that belonging to the only George Zimmer in the telephone book in Suffolk County, a cabinet maker who testified he

* "Tr." refers to the trial transcript. "GX" refers to Government Exhibits at trial.

had no knowledge of or connection with any of the participants in the case (Tr. 6-7, 17-21, 212-214).*

Printed purchase orders in the name of Zimmer & Associates at the address of the answering service and bearing the purported signature of George A. Zimmer were sent in December, 1971 and March, 1972 to the Sterling Seal Company in Erie, Pennsylvania, for approximately 28,000 jar caps which were identical to those used on the genuine Ultra Sheen. The caps were then shipped by Sterling at two different times to Zimmer & Associates at a freight depot where final delivery instructions were to be obtained by calling Zimmer at the answering service number (Tr. 25-32; GX 11-15). Robert D'Amato, the brother of the defendant Dennis D'Amato, took possession of one of these shipments of jar caps at the freight depot (Tr. 133-135, GX 24).

On January 17, 1972, Edward Hussey, a salesman for the Carr-Lowrey Glass Company, had a telephone conversation from his office on Madison Avenue in Manhattan with a man identifying himself as George Zimmer of Zimmer & Associates. The next day, pursuant to his normal practice Hussey mailed a letter to Zimmer at the answering service address confirming that samples of various jars were being sent and that Hussey would provide additional information as to the price, quantity and delivery terms for any jar which Zimmer might want to purchase.** On February 22, 1972, Hussey received in the mail a printed purchase order on the letterhead of Zimmer & Associates, signed by George A. Zimmer and bearing the answering

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* The ledger card kept by the answering service contained the reference "Do not use unless very important" next to the address and telephone number of the "real" George Zimmer, and Donovan instructed the answering service not to send anything through the mails (GX 1; Tr. 20-21).

** This letter constituted the mailing in Count 1 of the Indictment (GX 16).

service address, for 28,000 jars (Tr. 39-46; GX 16, 18).* These jars were the same general size and shape but not identical to those used in the manufacture of the genuine Ultra Sheen (Tr. 184-185, 195-206).

The jars were shipped by Carr-Lowrey in early March, 1972, to Zimmer & Associates at a local freight depot, from where final delivery was to be effected by calling the answering service telephone number used by Zimmer. James Bausch, the truckdriver who delivered the shipment of jars, identified Donovan as the man who met him at the freight depot and asked him to take the jars to the premises of the Ideal Decorating Corporation, a printer of labels on jars. Bausch followed Donovan to the Ideal plant where Bausch unloaded the cartons of jars (Tr. 59-87; GX 19).

An Ultra Sheen label looking almost exactly like that used on the genuine product was then affixed to the jars. James Chavis, the foreman of the shop, testified he had personally done the labelling on over 25,000 jars, using a silk screen process, during a five day period in March, 1972. He identified the jars containing the counterfeit Ultra Sheen which had thereafter been sold by Dennis D'Amato as the ones on which he had worked (Tr. 89-99; GX 5-10).** An invoice from Ideal Decorating Corp. dated March 10, 1972 showed that Zimmer & Associates, now using a non-existent address in Brooklyn, had ordered the labeling (Tr. 208; GX 22).

No testimony was offered by the Government on how and where the labeled jars were filled with the counterfeit ingredients. Over 18,000 jars of the finished counterfeit product were sold by Dennis D'Amato to six different wholesalers of drug and cosmetic products (Tr. 149-153,

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* The purchase order constituted the mailing in Count 2 of the Indictment (GX 18).

** Chavis testified on being recalled as a defense witness that the silk screen itself had been made in 1971 (Tr. 244).

162-168, 171-174; GX 23, 25, 26, 28). The actual delivery of the counterfeit Ultra Sheen to one of these companies was made by Robert D'Amato at the request of his brother, the defendant Dennis D'Amato, to the garage at the home of the owner of that company and not to its business address (Tr. 145-148).

In July, 1972, Johnson Products, Inc., the manufacturer of Ultra Sheen, brought a civil action against Dennis D'Amato and others seeking damages and an injunction in the United States District Court for the Eastern District of New York. Dennis D'Amato filed an affidavit in that action in which he denied knowledge of the counterfeit nature of the goods he had sold and told a lengthy story of how he had come to purchase a total of 1130 dozen, or 13,560, jars of Ultra Sheen in October, 1971 from a person known as Ritchie, a salesman for Balzac Trading. D'Amato attached the invoice he claimed he had received from Balzac to support his statements and asserted that this was the only time he had ever purchased Ultra Sheen. The evidence showed, however, that D'Amato had sold over 18,000 jars of Ultra Sheen, that the jars he sold were first labeled in March, 1972 and that the address for Balzac on the invoice submitted by D'Amato was non-existent and its telephone number had belonged to another company for 8 years (Tr. 176-177, 207, 211; GX 23, 25, 26, 28).

The Defense Case

Neither of the defendants testified. James Chavis, the employee at Ideal Decorating Corporation who testified during the Government's case, was recalled to put certain invoices from Ideal into evidence (Tr. 241-247).

ARGUMENT

POINT I

There Was Sufficient Evidence of Both Defendants' Guilt.

A. Donovan

Donovan argues that there was insufficient evidence that he had participated in the scheme to defraud, that he had used or caused the mails to be used and that the mailings were "for the purpose of executing the scheme". The argument ignores much of the evidence, both direct and circumstantial, that relate to those points and is thus without merit.

1. Participation in the Scheme

The indictment charged that Donovan's role in the scheme to manufacture and sell counterfeit Ultra Sheen was to purchase the jars and jar caps that would match the genuine product and to arrange for the labeling of those jars with the Ultra Sheen insignia. The proof at trial showed just that and, in addition, that Donovan had taken careful steps to avoid any subsequent detection by concealing his true identity.

Ernest Reinke, the owner of the Port Jefferson Telephone Answering Service, identified Donovan as the Mr. Zimmer from Zimmer & Associates who had utilized Reinke's mail drop and telephone answering service. Not only had Donovan given a false name but he paid all of the bills in person, with cash or a money order, and instructed Reinke not to try to contact him or use the mails to send him anything. Indeed, such attempts would have been futile since the address and telephone number pro-

vided to Reinke was that of the only George Zimmer in the telephone book, a cabinet maker who did not know any of the persons involved and had no knowledge of the facts.

Using the name of George Zimmer and Zimmer & Associates and the address and telephone number of the answering service, Donovan, who had worked as a salesman in the chemical industry for many years, proceeded to make contact and place purchase orders with the companies that made the jars and jar caps matching those of the genuine Ultra Sheen product.* Thereafter, when the jars were delivered to Zimmer & Associates at a freight depot,** Donovan met the truckdriver, James Bausch, and escorted him and the truck of empty jars to the Ideal Decorating Company where the jars were labelled with the Ultra Sheen insignia.*** These jars were thereafter filled and

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* The jar and jar cap manufacturing companies were contacted by a man purporting to be George Zimmer of Zimmer & Associates. The correspondence and purchase orders to the firms all contained the signature of George Zimmer and the salesman for the glass company spoke on the telephone to Mr. Zimmer. There was substantial evidence from which the jury could conclude that Donovan was Zimmer: Reinke at the answering service knew him as Mr. Zimmer; Donovan had arrived at the freight depot to meet a shipment of jars consigned to Zimmer & Associates; after Donovan was discovered by Postal Inspectors at the offices of the answering service, he changed the name on the account there to Donovan & Associates. Finally, there was simply no evidence that anyone else used the alias Zimmer or Zimmer & Associates.

** The trucking company had been instructed to telephone Zimmer at the answering service number when the jars were to arrive (GX 18).

*** An invoice from Ideal Decorating Co. showed that the jars had been labelled for the account of Zimmer & Associates (GX 22). This time, however, the address used was not that of the answering service but of a non-existent location. In Point III, Donovan argues that it was error to admit the invoice into evidence, apparently on the ground that it was not properly authen-

[Footnote continued on following page]

then sold by Dennis D'Amato to various wholesalers as the genuine product.

Based on these facts the jury was certainly warranted in concluding that Donovan was playing a key role in the scheme to manufacture and sell the counterfeit Ultra Sheen.

2. Mailings

Judge Gagliardi properly charged the jury that it must find with respect to each mail fraud count that Donovan mailed or caused the mailing of the item specified in the indictment and that the mailing was for the purpose of executing the scheme.* The mailing which constitutes

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ticated as a business record pursuant to 28 U.S.C. § 1732. But Chavis testified that there was a regular procedure in preparing invoices and that, although he was not in charge of it, he was familiar with the company's practice (Tr. 89, 93, 95-97, 241, 243). As such, he then properly authenticated the invoice pursuant to the statute. *United States* v. *Dawson*, 400 F.2d 194 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Moreover, contrary to Donovan's assertions, there was no reason to doubt the reliability of the invoice as a business record. The invoice bore the number 03951 and was dated March 10, 1972. Other invoices in evidence in this series included 03940 to 03944 with dates between December 14, 1971 and January 12, 1972 (Donovan Exhibit E). Moreover, since the jars consigned to Zimmer & Associates had been delivered by Bausch and Donovan to Ideal on March 3, an invoice for this labelling work dated March 10 would surely be ordinary and normal. In any event, the importance of the invoice was *de minimus*. It was Donovan's presence at Ideal with the jars as testified to by Bausch which was his undoing, not the invoice to Zimmer.

* In Point IV, Donovan argues that in light of the Supreme Court's recent decision in *United States* v. *Maze*, 414 U.S. 395 (1974), Judge Gagliardi erred when he told the jury that "it is not necessary that the scheme contemplate the use of the mails." But the Court's statement of the law was correct. *Maze* expressly upheld the correctness of those very words: "Under the statute, the mailing must be for the 'purpose of executing the scheme, as the statute requires,' *Kann* v. *United States*, 323 U.S.

[Footnote continued on following page]

Count 1 was the letter by Edward Hussey, a salesman from the Carr-Lowrey Glass Company, to Zimmer & Associates confirming a telephone request by Mr. Zimmer for various samples of their jars and advising of the procedure to be followed in placing an order for them (GX 16). The mailing which constitutes Count 2 is the actual order form to Carr-Lowrey on the letterhead of Zimmer & Associates at the answering service address for over 28,000 jars (GX 18).

The Count 1 letter to Zimmer from Hussey following the telephone call was obviously "caused" by Donovan.* "When one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira* v. *United States*, 347 U.S. 1, 9 (1954); *United States* v. *Maze*, 414 U.S. 395, 399 (1974). It was Hussey's standard practice as a salesman to send a letter of this type to a potential customer who had requested samples, a practice that was certainly foreseeable in normal business rela-

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88, 94 (1944), but '[i]t is not necessary that the scheme contemplate the use of the mails as an essential element,' *Pereira* v. *United States* [347 U.S. 1, 8 (1954)]." 414 U.S. at 400.

Donovan also contends generally that the Court's entire charge on mailing was error. But a reading of the Court's remarks makes it clear that this is simply not so (Tr. 331-332, 334-335).

* The jury could well find that Donovan was Zimmer and thus the man who spoke with Hussey on the telephone, *supra*, fn. 1, page 7. But even if this were not so, Donovan would still be responsible for "causing" the mailing since the telephone call would then have been made by another participant in the criminal venture. *United States* v. *Cohen*, 145 F.2d 82, 90 (2d Cir.) (L. Hand, J.), *cert. denied*, 323 U.S. 799 (1944); *United States* v. *Zane*, 495 F.2d 683, 696-697 (2d Cir. 1974); *United States* v. *Aisondo*, 486 F.2d 1339, 1346-1347 (2d Cir. 1973), *cert. granted as United States* v. *Feola*, 42 U.S.L.W. 3584 (April 15, 1974).

tionships and especially so to Donovan, who was also a salesman. And since the letter related to the important task of choosing and ordering a jar that would match the genuine Ultra Sheen jar, it was "incident to an essential part of the scheme," *Pereira* v. *United States, supra,* 347 U.S. at 8, and in furtherance of it. Similarly the Count 2 purchase order from Zimmer to the glass company for the empty jars was obviously in furtherance of the scheme. It was received by Carr-Lowrey in the mails as a result of action taken either by Donovan, who took delivery of the jars, or by an unknown participant in the scheme and was thus "mailed or caused to be mailed" by him.*

B. D'Amato

D'Amato argues that there was insufficient evidence to convict him. But this argument ignores the uncontestable facts demonstrating the falsity of the affidavit he submitted and is thus without merit.

The false statements charge in the indictment is that D'Amato told a wholly fictitious tale of how, in October, 1971, he had obtained the counterfeit Ultra Sheen. D'Amato's affidavit contains a lengthy narrative of meeting, in a small retail store, a young man he knew only as "Ritchie", a salesman for Balzac Trading, who sold him the 1130 dozen jars of Ultra Sheen in October, 1971. D'Amato stated this was the only Ultra Sheen he had ever purchased and attached an invoice from Balzac to support his story of the purchase.

The proof established, however, that such a purchase was impossible because the jars of Ultra Sheen which D'Amato sold were not in existence until March, 1972 and

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* Donovan argues without any support in the record that there was insufficient proof of the mailing of the purchase order. But Hussey testified that the purchase order arrived in the mail and had the glass company's stamp of receipt on it (Tr. 43, 52).

that D'Amato sold approximately 5,000 more jars of Ultra Sheen that his affidavit could allow. The jars of Ultra Sheen which D'Amato sold were identified by James Chavis, the foreman of Ideal Decorating Corporation, as being part of over 25,000 jars on which he placed an Ultra Sheen label in March 1972. Those were the same jars sent by the Carr-Lowrey Glass Company to Zimmer & Associate which James Bausch delivered to Ideal on March 3, 1972.* Moreover, although D'Amato carefully set forth as his only involvement with Ultra Sheen the purchase from Balzac of 1130 dozen or 13,560 jars, the proof showed he had sold 1530 dozen or 18,360 jars.

From the proof of these two facts alone, it is clear that D'Amato lied in the affidavit as to how he obtained the counterfeit product. But the Government also established that Balzac Trading did not exist and that it was Robert D'Amato, the defendant's brother, who had picked up the jar caps purchased by Zimmer & Associates and used on the counterfeit product which Dennis D'Amato later sold. There was thus overwhelming evidence to support the jury's finding that D'Amato had knowingly made false statements in the affidavit.**

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* D'Amato seeks to avoid the impact of these facts by arguing that inasmuch as Chavis made the silkscreen he used to label the jars of Ultra Sheen in 1971 and the jars were freely available, the Government failed to "eliminate the possibility that the counterfeit, which the defendant sold, had been manufactured earlier in 1971 and that, indeed, the defendant made his purchase in October 1971" (D'Amato's Brief, p. 16). But although Chavis admitted *making* the silk screen in 1971, his testimony was clear that he *used* it in March, 1972. And the jars, although ordinary and freely available to anyone who sought to purchase them, had in fact rarely been sold. Indeed, the Carr-Lowrey sales record for this jar showed that no sales had occurred at all in 1971 (GX 31).

** D'Amato also argues that the Court erred in not charging the jury that the false statement must be as to a material fact.

[Footnote continued on following page]

POINT II

The In-Court Identification of Donovan Was Proper.

James Bausch, the truckdriver who delivered the Carr-Lowrey jars consigned to Zimmer & Associates, identified Donovan as the man he met at the freight depot on March 3, 1972 and then followed to the Ideal Decorating Co. where the jars were unloaded. Donovan's argument that this in-court identification should not have been permitted is without merit.

On January 10, 1973, Bausch was interviewed by a U.S. Postal Inspector who showed him a group of 15 photographs and asked him to select anyone he recognized. Although there were two photos of Donovan—one with a penciled moustache and sideburns and one without—Bausch selected only one of the Donovan photos and one other, that of Donovan's brother, as looking like the man he met at the depot. Bausch was again shown the same photos at the United States Attorney's office in April 1972, but did not see any of the photos again prior to the trial in December, 1972.

After a hearing out of the presence of the jury (Tr. 60-73), Judge Gagliardi ruled that the identification testimony should be allowed both since the spread of photos was not impermissibly suggestive and because Bausch had seen Donovan on three separate occasions for approximately ten minutes and had not seen the photos for eight months (Tr. 76).

As D'Amato recognizes, that is not the law in this Circuit. *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States* v. *Rinaldi*, 393 F.2d 97 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968). In any event, it would be hard to envision anything more material in the context of this case than the fact about which D'Amato lied—the source of the counterfeit goods which he sold to drug and cosmetic wholesalers.

This ruling was clearly correct. In order for the identification testimony to be excluded there must be "a showing both of impermissibly suggestive procedures and of the substantial likelihood of misidentification," *United States* v. *Evans*, 484 F.2d 1178, 1184 (2d Cir. 1973). See also *Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Yanishefsky*, Dkt. No. 74-1117 (2d Cir., July 30, 1974), slip op. at 5050; *Haberstroh* v. *Montanye*, 493 F.2d 483 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973); *United States* v. *Fernandez*, 456 F.2d 638 (2d Cir. 1972). Here, the procedures were obviously not suggestive, for from a spread of 15 photographs the witness selected one photo of Donovan and one of his brother as "looking like" the man he had met. This tentativeness in Bausch's identification is itself evidence that the procedure was fair.* See *United States* v. *Evans*, *supra*, 484 F.2d at 1185. In any event, Bausch had more than ample opportunity to make an independent identification of Donovan. At the freight depot Bausch talked to Donovan for three or four minutes before agreeing to follow him and deliver the jars to the Ideal Decorating Company. En route to Ideal, Bausch lost sight of Donovan and then had a short meeting when the two of them found each other. Finally, at Ideal, where Bausch spent approximately two hours unloading the truck, he again saw Donovan. All of these meetings occurred during the day time. Under these circumstances, the in-court identification was properly permitted, as there was no danger of "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *Neil* v. *Biggers*, *supra*; *United States* v. *Yanishefsky*, *supra*; *United States ex rel. Gonzalez* v.

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* Nor does the fact that two photos of the same man are shown to the witness, by itself, constitute impermissible suggestion. *United States* v. *Baker*, 419 F.2d 83, 89-90 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970); *Simmons* v. *United States*, 390 U.S. 377, 385, 386 n. 6 (1968).

Zelker, supra; United States ex rel. Smiley v. *LaVallee*, 473 F.2d 682 (2d Cir.), *cert. denied*, 412 U.S. 952 (1973); *United States* v. *Counts*, 471 F.2d 422, 424-425 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260, 264-265 (2d Cir. 1972); *United States ex rel. Curtis* v. *Warden*, 463 F.2d 84, 85, 88 (2d Cir. 1972); *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020, 1024 (2d Cir. 1972); *United States* v. *Fernandez, supra*, 456 F.2d at 642; *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *United States ex rel. Beyer* v. *Mancusi*, 436 F.2d 755 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971).

POINT III

Venue Was Proper in the Southern District of New York.

D'Amato argues that the only proper venue for the trial of the false statements charge was the Eastern District of New York and consequently the conviction must be reversed. This argument, based upon the premise that a prosecution under 18 U.S.C. § 1001 can only be brought in the judicial district in which the false statement is filed or presented to the Government, is without merit.

After a lawsuit seeking damages and an injunction was brought by the manufacturer of the genuine Ultra Sheen in the Eastern District of New York, D'Amato discussed the facts of the case with his attorney in her office in Manhattan. As a result of that discussion, the affidavit was prepared and typed in the lawyer's office and, indeed, bears the notation "State of New York, County of New York" in its preamble. The affidavit was signed by D'Amato in Brooklyn and then filed there with the Court.

When a crime is begun in one district and completed in another, venue is proper in any district in which it was "begun, continued, or completed". Title 18, United States Code, Section 3237(a). This statute is applicable to prosecutions under § 1001,* *United States* v. *Candella*, 487 F.2d 1223 (2d Cir. 1973), *United States* v. *Miller*, 248 F.2d 163 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957), as well as other analagous false statements statutes. See *United States* v. *Slutsky*, 487 F.2d 832 (2d Cir. 1973); *United States* v. *Gross*, 276 F.2d 816 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960). In *United States* v. *Bithoney*, 472 F.2d 16 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973), a false statement case under 18 U.S.C. § 1015 upon which D'Amato mistakenly relies,** the Court held that false statement offenses involving the making and filing of a document are begun in the district of the preparation of the document and completed in the district where the document is turned over to the Government. Under *United States* v. *Candella*, *supra*, a prosecution under § 1001, venue is proper in

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* D'Amato's reliance upon *Travis* v. *United States*, 364 U.S. 631 (1961) to nullify the applicability of § 3237(a) to § 1001 and other false statements prosecutions is simply misplaced, as the cases cited herein which continue to apply it make clear. Indeed, in *United States* v. *Slutsky*, 487 F.2d 832, 839 n. 8 (2d Cir. 1973) this Court made clear that the holding as to venue in *Travis* was as a result of the "unusual statute involved"—necessarily Section 9h of the Taft-Hartley law—and was not to be applied to § 1001 prosecutions generally.

** D'Amato's argument has confused the determination of what acts a defendant must commit in a false statements case before a crime has in fact occurred with the determination of the proper venue for the trial of the case once the crime has occurred. Thus, in *Bithoney*, the Court stated that no prosecution could be brought at all if the defendant had never filed the false statement with the Court or administration agency as, for example, if he had destroyed it before filing. But the Court stated that once the filing has taken place, the prosecution may be had in other districts than that in which the filing was made, including the district in which the false document were prepared.

"'the whole area through which force propelled by an offender operates'". 487 F.2d at 1228. In that case, the false statements had been both prepared and filed with the Government in the Eastern District and venue was clearly proper there. Nevertheless, the Court held that venue was also proper in the Southern District because the false statements were intended to be acted upon in Manhattan and thus the "force propelled" by the defendants encompassed the Southern District.

Under these authorities, venue in the Southern District was clearly proper in this case. The affidavit was created, or, in the words of Section 1001, "made" in the Southern District and once filed, the crime must surely be considered to have "begun" there. Moreover, the "force propelled" by D'Amato in making the false statement included both the Southern and Eastern Districts of New York.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

HOWARD WILSON,
JOHN D. GORDAN III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1974— 405—74

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of August, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

THOMAS J. O'BRIEN, ESQ.
2 Pennsylvania Plaza
New York, New York 10001

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

19th day of August, 1974

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-[illegible]3540
Qualified in Kings County
Commission Expires March 30, 1975

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of August, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

GERALD L. SHARGEL, ESQ.
522 Fifth Avenue
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

19th day of August, 1974 Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975